NO. 85-993

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

PAULA A. HOBBIE,
APPELLANT,
V.
UNEMPLOYMENT APPEALS COMMISSION
AND LAWTON AND COMPANY,
APPELLEES.

ON APPEAL FROM THE DISTRICT COURT
OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

MOTION TO DISMISS OR AFFIRM

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Constitutional and Statutory Provisions

Section 20.171(4), Florida Statutes (1983), provides:

> (a) There is created within the Department of Labor and Employment Security an Unemployment Appeals Commission, hereinafter referred to as the "commission." * * *
>
> * * *
>
> (c) The Commission is vested with all authority, powers, duties, and responsibilities relating to unemployment compensation appeal proceedings under Chapter 443.

Section 443.021, Florida Statutes (1983), provides:

> Declaration of public policy. --
>
> As a guide to the interpretation and application of this chapter, the public policy of this state is declared to be as follows: Economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of this state. Unemployment is therefore a subject of general interest and concern which requires appropriate action by the Legislature to prevent its spread and to lighten its burden

> which now so often falls with crushing force upon the unemployed worker and his family. The achievement of social security requires protection against this greatest hazard of our economic life. This objective can be furthered by operating free public employment offices in affiliation with a nationwide system of employment services, by devising appropriate methods for reducing the volume of unemployment and by the systematic accumulation of funds during the periods of employment from which benefits may be paid for periods of unemployment thus maintaining purchasing power and limiting the serious social consequences of unemployment. The Legislature, therefore, declares that in its considered judgment the public good, and the general welfare of the citizens of this state require the enactment of this measure, under the police power of the state, for the establishment and maintenance of free public employment offices and for the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own, subject, however, to the specific provisions of this chapter. (emphasis added)

Section 443.101(1)(a)2., Florida Statutes (1983), provides:

> 2. Disqualification for being discharged for misconduct connected

with his work shall continue for the full period of unemployment next ensuing after having been discharged and until such individual has become reemployed and has earned wages not less than 17 times his weekly benefit amount and for not more than 52 weeks which immediately follow such week, as determined by the division in each case according to the circumstances in each case or the seriousness of the misconduct, pursuant to rules of the division enacted for determinations of disqualification for benefits for misconduct.

Section 443.101(2), Florida Statutes (1983), provides:

(2) If the division finds that the individual has failed without good cause either to apply for available suitable work when so directed by the division or employment office, or to accept suitable work when offered to him, or to return to his customary self-employment when so directed by the division, such disqualification shall continue for the week in which such failure occurred and for not more than 5 weeks immediately following such week, or a reduction by not more than 3 weeks from the duration of benefits, as determined by the division in each case. However, disqualification under this subsection shall continue for the full period of unemployment next ensuing after he has failed without good cause either to apply

for available suitable work, or to accept suitable work, or to return to his customary self-employment, pursuant to this subsection, and until such individual has become reemployed and has earned wages equal to or in excess of 17 times his weekly benefit amount. * * *

(a) In determining whether or not any work is suitable for an individual, the division shall consider the degree of risk involved to his health, safety, and morals; his physical fitness and prior training; his experience and prior earnings; his length of unemployment and prospects for securing local work in his customary occupation; and the distance of the available work from his residence.

* * *

Section 443.131(3)(a), Florida Statutes (1983), provides:

(3) CONTRIBUTION RATES BASED ON BENEFIT EXPERIENCE. --

(a) The regular and short-time compensation benefit payments made to any eligible individual shall be charged to the employment record of each employer who paid such individual wages equal to $100 or more within the base period of such individual in the proportion to which wages paid by each such employer to such individual within the base period bears to total wages paid by all such employers to such individual within the base

period. * * * Further, benefit payments will not be charged to the accounts of employers when such employers have furnished the division with such notices regarding separations of individuals from work and the refusal of individuals to accept offers of suitable work as are required by the provisions of this chapter and the rules of the division, if one or more of the following conditions are found to be applicable:

1. When an individual has left his job without good cause attributable to his employer or has been discharged by his employer for misconduct connected with his work, no benefits subsequently paid to him on the basis of wages paid to such individual by such employer prior to such separation shall be charged to such employer's account. (emphasis added).

STATEMENT OF THE CASE

The Unemployment Appeals Commission substantially accepts appellant Hobbie's statement of the case. The statement, however, is not complete. The Florida administrative hearing officer who conducted the evidentiary hearing below made the following additional findings.

(Jurisdictional Statement, Appendix A). Lawton and Company maintains a policy prohibiting management personnel from scheduling themselves to be off from work on Friday evenings and Saturdays on a regular basis. The rationale for the policy is that retail sales activity for the company is greatest at those times. Since Hobbie held the position of assistant manager, the policy applied to her. When Hobbie was baptized in the Seventh Day Adventist Church, she worked out a scheme with her supervisor, the store manager, to violate the policy. For three weeks she managed to be off from work on Friday nights and Saturdays. Subsequently, the general manager and his supervisor learned of the scheme and advised Hobbie and the store manager that the company allowed no exceptions to the policy. On June 1, 1984, Hobbie was advised that she must comply with the company policy or resign. Hobbie

refused to resign and the company demanded her keys to the store.

MOTION TO DISMISS

The appellant Hobbie seeks to invoke the Court's jurisdiction pursuant to 28 U.S.C. §1257(2). Jurisdiction is provided under that section to review a decision of the highest court of a state where the validity of a state statute is challenged as repugnant to the Constitution, treaties, or laws of the United States and the decision is in favor of its validity. The decision which the appellant asks the Court to review is a decision of the District Court of Appeal of the State of Florida, Fifth District. In its entirety, the decision states, "Per Curiam. Affirmed." Hobbie v. Unemployment Appeals Commission, 475 So.2d 711 (Table) (Fla. 5th DCA 1985).

A per curiam affirmance decision of a Florida district court of appeal without written opinion is not reviewable by the Supreme Court of Florida. Jenkins v. State 385 So.2d 1356 (Fla. 1980). The Unemployment Appeals Commission does not, therefore, contest that the decision below was rendered "by the highest court of a State in which a decision could be rendered." 28 U.S.C. 1257. See also Nash v. Florida Industrial Commission, 389 U.S. 235, 237 n.1 (1967).

It is not clear, however, that the federal question which the appellant seeks the Court to review was properly raised and passed on below. Under Florida law, a per curiam affirmance decision without written opinion has no precedential value. Department of Legal Affairs v. District Court of Appeal, Fifth District, 434 So.2d 310 (Fla. 1983). Such a decision does not necessarily adopt the decision being reviewed

because "[t]he rationale and basis for the decision without opinion is always subject to speculation." Id. at 312.

Thus, the decision which the appellant seeks the Court to review is the decision of the Unemployment Appeals Commission which adopted the decision of its unemployment compensation hearing officer.

The Unemployment Appeals Commission is the Florida administrative agency responsible for resolution of disputed unemployment compensation claims. §20.171(4)(a) & (c), Fla. Stat. (1983). Florida administrative agencies are vested with executive and delegated legislative powers. They do not possess judicial powers. They cannot, therefore, pass on the constitutionality of legislation. See, e.g., State Department of Administration, Division of Personnel v. State Department of Administration, Division of Administrative Hearings, 326 So.2d 187 (Fla. 1st DCA 1976); Pickerill

v. Schott, 55 So.2d 716 (Fla. 1951). See also Swan, Administrative Adjudication of Constitutional Questions: Confusion in Florida Law and a Dying Misconception in Federal Law, 33 U. Miami L. Rev. 527 (1979).

The Unemployment Appeals Commission does not possess the legal authority to rule on the federal question which the appellant seeks the Court to review. The Florida Fifth District Court of Appeal, which does possess such authority, expressed no opinion on the question.

The appellant has failed to demonstrate that the decision below expressly passed upon the federal question which the appellant asks the Court to review. The appellant has, therefore, failed to establish jurisdiction under 28 U.S.C. §1257(2). Nash v. Florida Industrial Commission, 389 U.S. 235, 237 n.1 (1967), suggests that the appellant might have been

able to invoke the Court's jurisdiction pursuant to 28 U.S.C. §1257(3), governing certiorari, and the Court may elect to proceed under that jurisdiction. 28 U.S.C. §2103. This appeal, however, must be dismissed.

MOTION TO AFFIRM

The Unemployment Appeals Commission agrees with Hobbie that the precise issue presented is one of first impression for the Court. The Unemployment Appeals Commission further agrees that the issue has been passed on by several state appellate courts with conflicting results. Compare Hildebrand v. Unemployment Ins. Appeals Bd., 140 Cal. Rptr. 151, 566 P.2d 1297 (1977), cert. denied, 434 U.S. 1068 (1978) (denying benefits); and Martinez v. Industrial Comm'n of Colorado, 618 P.2d 738 (Colo. Ct. App. 1980)(denying benefits); and Flynn v. Maine Employment Sec. Comm'n,

448 A.2d 905 (Me. 1982), cert. denied, 459 U.S. 1114 (1983)(denying benefits); and DePriest v. Puett, 669 S.W.2d 669 (Tenn. Ct. App. 1984)(denying benefits); and DePriest v. Bible, 653 S.W.2d 721 (Tenn. Ct. App. 1980)(denying benefits); and Levold v. Employment Sec. Dept., 604 P.2d 175 (Wash. Ct. App. 1979)(denying benefits) with Engraff v. Industrial Comm'n, 678 P.2d 564 (Colo. Ct. App. 1983)(allowing benefits); and Key State Bank v. Adams, 360 N.W.2d 909 (Mich. Ct. App. 1984)(allowing benefits). Since the question presented is one of first impression and the state court opinions on the issue are hopelessly in conflict, Hobbie's argument for summary reversal depriving the parties an opportunity to fully brief the merits of the issue is totally without merit.

If the Court declines to note probable jurisdiction, the decision below must be affirmed. There is simply no controlling

authority justifying reversal. Thomas v. Review Bd. of Indiana Employment Sec., 450 U.S. 707 (1981) and Sherbert v. Verner, 374 U.S. 398 (1963) are substantially different factually and conceptually from this case.

Sherbert held that state unemployment compensation officials cannot deny benefits to an applicant on the sole basis that the applicant refuses to seek or accept employment which would require the applicant to violate a religious conviction. Such action by a state was held violative of the free exercise clause of the First Amendment because it requires the applicant to choose between observance of religious convictions or forfeiture of unemployment compensation. South Carolina officials had construed its unemployment compensation statute so as to disqualify a Seventh Day Adventist who refused to accept employment which required her to work on her Sabbath. If Sherbert had arisen in Florida, it would have been

differently decided at the state level. Florida's unemployment compensation law permits claimants to refuse employment for compelling personal reasons, including moral reasons. §443.101(2), Fla. Stat. (1983). E.g. Yordamlis v. Florida Industrial Commission, 158 So.2d 791 (Fla. 3d DCA 1963)(benefits allowed to a claimant who refused offer of nighttime work because it conflicted with his familial responsibilities). The failure of the South Carolina law to recognize compelling personal reasons for refusing work presented the unemployed claimant in Sherbert the dilemma of choosing between her religious convictions or forfeiture of her unemployment benefits. That dilemma would have recurred each time the claimant became unemployed. No such dilemma is presented to Hobbie by Florida's unemployment compensation law. She is permitted to restrict her search for work to positions

compatible with her religious convictions provided her religion does not place so many restrictions on what work is acceptable that she is effectively removed from the labor market. Once she finds acceptable employment and earns seventeen times her weekly benefit amount, the penalty imposed in this case, she will be on an equal footing with all other workers. Moreover, if a future employer unilaterally changes the conditions of her employment so as to require Hobbie to violate her religion, she can quit without forfeiting her entitlement to unemployment compensation benefits. The Unemployment Appeals Commission has consistently held that an employer's substantial and unilateral change of a material condition of an employee's job constitutes good cause attributable to the employer for the employee to quit within the meaning of Section 443.101(1), Florida Statutes (1983). E.g., Vazquez v.

GFC Builders Corporation, 431 So.2d 739 (Fla. 4th DCA 1983). Unless the employee agrees to accept any schedule assigned by the employer, a worker who quits because of a unilateral change in schedule that works a substantial hardship on the employee would be entitled to benefits. See Beard v. State Department of Commerce, 369 So.2d 382 (Fla. 2d DCA 1979). Accordingly, if the Thomas case had arisen in Florida it too would have been decided in favor of the claimant.

In Thomas, the Court held that state unemployment compensation officials cannot deny benefits to an applicant because the applicant quit employment when his employer changed the conditions of his employment so as to require him to violate his religious convictions if he remained. Again, the Court held such state action to be violative of the applicant's First Amendment right to free exercise of religion.

This case presents the question whether an employee may change her religious convictions while already employed and force her employer to change the conditions of her employment to accommodate her new religious convictions. Hobbie's employer and the State of Florida concluded that she could not. Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977), instructs that Lawton and Company was correct. In that case, the Court refused to construe Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000 et. seq., as requiring an employer to discriminate against some employees in order to enable others to observe their Sabbath. Although Hobbie's employer was not legally obligated to provide her special treatment, Hobbie argues that Sherbert and Thomas dictate that the State of Florida provide such special treatment to her. Sherbert and Thomas hold that the states are restricted by the

free exercise clause from making demands on employees who become unemployment compensation claimants when those demands require the employee to violate religious convictions or forego valuable benefits. This case asks the Court to consider what demands an employee may make of her employer to accommodate religious convictions acquired after the employment commenced. This case also asks the Court to consider what special treatment a state must provide to a person who becomes unemployed because of her religious convictions then applies for government assistance.

Lawton and Company refused to discriminate against other employees in order to accommodate Hobbie's newly acquired religious convictions. The State of Florida refused to discriminate against other applicants for benefits by providing special treatment to Hobbie.

Florida's Unemployment Compensation Law, Chapter 443, Florida Statutes (1983), disqualifies claimants who voluntarily leave employment without good cause attributable to the employer, or who are discharged from employment for misconduct connected with work. §443.101(1), Fla. Stat. (1983). Disqualification of such workers is consistent with the declared public purpose of the program to provide benefits only to those persons unemployed through no fault of their own. §443.021, Fla. Stat. (1983). The word "fault" is used in the attributive sense and not the moral sense of the word. E.g., Slusher v. State Department of Commerce, 354 So.2d 450 (Fla. 1st DCA 1978)(benefits denied to a worker who quit employment to accompany her spouse who had relocated to another state).

Initially, Hobbie conspired with her supervisor to circumvent her employer's policy regarding scheduling of managerial

employees. When the conspiracy was discovered, she defied the employer's demand that she comply with the policy or resign. She refused to do either. Unquestionably, such actions would fall within the definition of misconduct as expressed in Florida's Unemployment Compensation Law. §443.036(24), Fla. Stat. (1983). Similarly, if she had resigned, she would have been subject to disqualification because her reason for quitting was not attributable to her employer.

Hobbie argues, however, that she is shielded from disqualification by the First Amendment. She asks the Court to compel the State of Florida to treat her differently because her defiance of her employer's directive was motivated by her religious convictions. Hobbie asks the Court to demand the State of Florida adopt a rule of law providing more favorable treatment of persons who become unemployed

for religious reasons than it provides for those who become unemployed for equally compelling secular reasons.

Such a rule of law would directly conflict with the establishment clause. In Estate of Thornton v. Caldor, ___ U.S. ___, 105 S.Ct. 2914 (1985), the Court held a Connecticut statute that required employers to observe the day of the week designated by each employee as his Sabbath was violative of the establishment clause. The Court stated that the statute:

> imposes on employers and employees an absolute duty to conform their business practices to the particular religious practices of the employee by enforcing observance of the Sabbath the employee unilaterally designates.

Id. at 2917-18. In expressing the Court's opinion, Chief Justice Burger quoted Judge Learned Hand:

> "The First Amendment . . . gives no one the right to insist that in pursuant of their own interests

> others must conform their conduct to his own religious necessities." Otten v. Baltimore & Ohio R. Co., 205 F.2d 58, 61 (CA2 1953).

Id. at 2918. The Court has stated that the establishment clause prohibits the states from passing laws "which aid one religion . . . [or] all religions." Everson v. Board of Education, 330 U.S. 1, 15 (1947). In Torcaso v. Watkins, 367 U.S. 488, 495 (1961), the Court stated that the government cannot "constitutionally pass laws or impose requirements which aid all religions as against non-believers."

If the State of Florida were to amend its unemployment compensation statute to provide that behavior of an employee which would otherwise constitute misconduct is acceptable if motivated by religious convictions it would surely run afoul of the establishment clause. It would also require the state to inquire whether the claimant's beliefs are "religious" and if

they are sincerely held. Thomas, 450 U.S. at 726 (REHNQUIST, J., Dissenting). Such a situation would inevitably entangle the state in religious matters contrary to the First Amendment.

In both Sherbert and Thomas, the Court recognized the "tension" between the free exercise and establishment clauses. In both instances, the Court stated that the result reached was not violative of the establishment clause. Justice HARLAN dissenting in Sherbert and Justice REHNQUIST dissenting in Thomas protested that the Court simply refused to squarely address the issue in either case. The Unemployment Appeals Commission respectfully expresses agreement with the minority view in both cases. Neither Sherbert nor Thomas can be reconciled with the principles expressed in cases such as Anguilar v. Felton, ____ U.S. ____, 105 S.Ct. 3233 (1985):

> neither the State nor Federal Government shall promote or hinder a particular faith or faith generally through advancement of benefits or through excessive entanglement of church and state in the administration of those benefits.

Id. at 3239. In Estate of Thornton the Court condemned a state statute requiring employers to observe the Sabbath chosen by its employees. In Sherbert and Thomas the Court demanded that South Carolina and Indiana adopt rules of law having the same effect as the offending Connecticut statute. Sherbert and Thomas demand in the name of the free exercise clause what Estate of Thornton condemns in the name of the establishment clause.

Even if the establishment clause would permit special treatment of unemployment compensation claimants on religious grounds, the free exercise clause does not demand that the states provide such treatment. Sherbert, 374 U.S. at 423 (HARLAN,, J. dissenting) Thomas 450 U.S. at 723

(REHNQUIST, J. dissenting). Braunfeld v. Brown, 366 U.S. 599 (1961). Florida's unemployment compensation statute is a general law promoting a secular purpose. It did not penalize Hobbie because she became a Seventh Day Adventist. It penalized her because she refused to work her regularly assigned schedule and thereby caused her unemployment. Unquestionably Florida has a valid interest in promoting employment and discouraging voluntary unemployment. Hobbie, not her employer, changed the status quo when she adopted new religious convictions. Payment of benefits to Hobbie with resulting tax consequences to Lawton and Company, §443.131(3)(a), Fla. Stat. (1983), would effectively allow Hobbie to impose the requirements of her religion on another. This the First Amendment neither demands nor allows.

Conclusion

This case presents a question of first impression, similar to but not controlled by Sherbert and Thomas. In the absence of a controlling authority to the contrary, the decision below must be affirmed or probable jurisdiction noted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed to Walter E. Carson, Johns and Carson, 6840 Eastern Avenue, N.W., Washington, D.C. 20012; Frank M. Palmour, Rumberger, Kirk, Caldwell, Cabaniss & Burke, 11 East Pine Street, Orlando, Florida 32802 and to Joseph W. Carvin, Alley and Alley, Chartered, P. O. Box 1427, Tampa, Florida 32790.

/s/ John D. Maher